seems to have been passed.[4] Nevertheless the legislature might still be said to have the legal power to disregard the popular vote; for state constitutions commonly provide that, "deliberation, speech and debate in either house of the legislature . . . cannot be the foundation of any accusation or prosecution, action or complaint in any other court or place whatsoever." [5] Were those provisions removed and violation of ante-election pledges made a crime, an election by the legislature in violation of its members' pledges would doubtless be effective, although subjecting the legislators to criminal prosecution. In such a state of affairs, even if the bare legal power to disregard the popular vote remained, no legislature would exercise that power. There would then be substantial nullification of the provision in the federal Constitution for "two Senators from each State, chosen by the Legislature thereof." [6]

The Senate is the "Judge of the Elections, Returns, and Qualifications of its own Members." [7] It might conceivably declare that a man chosen under one of these devices was not constitutionally elected. But it is believed that the existence of this power in the Senate does not preclude the courts from passing on the constitutionality of statutes providing for popular vote, when the question comes up in mandamus or injunction proceedings to require or prevent the taking of such a vote.[8] A decision of the Senate or even a resolution not called forth by any particular case (although not binding on future sessions of that body) would of course be followed by the courts. But it is submitted that, in the absence of any precedent in the Senate journal, every possible doubt should be resolved by the courts in favor of the constitutionality of these devices, otherwise the matter can never be squarely presented to the Senate where the final decisions of these questions must rest.

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THE LEGALITY OF VOTING TRUSTS. — The most common device today of majority stockholders to secure stability in the corporation's policy and administration is the so-called "voting trust." The stockholders transfer their shares to trustees with power to vote them, and receive in return certificates giving all the beneficial interest in the stock except the voting power. The validity and effect of these agreements have been the subject of a great diversity of judicial opinion, as is illustrated by two recent decisions reaching opposite results. In *Boyer* v. *Nesbitt et al.*, 76 Atl. 103 (Pa.), the validity of a voting trust formed by the majority stockholders of a corporation for the purpose of maintaining its then officers in power and continuing the same business policy, was in question. The trustees were given the power to vote the stock, and a first option to purchase, for the benefit of the remaining members,

[4] Such a provision has been held to violate the state constitution of North Dakota. State *ex rel.* McCue *v.* Blaisdell, 118 N. W. 141 (N. D.).

[5] MASS. CONST., Pt. I, Art. XXI. For similar provisions in other state constitutions see STIMSON, FEDERAL AND STATE CONSTITUTIONS, 236.

[6] U. S. CONST., Art. I, sec. 3. Compare the substantial nullification, without the aid of legislation, of the similar provision for indirect election of President.

[7] U. S. CONST., Art. I, sec. 5.

[8] But see State *v.* Blaisdell, *supra.*

the shares of any member of the syndicate who wished to sell. The agreement was held to be valid, and not in contravention of the Pennsylvania statutes providing for annual elections by stockholders, and that proxies should be good for only two months after their issue. It was further held that the option given to the trustees to purchase shares was an interest which prevented the revocation of their power to vote. Upon almost identical facts, and under a similar statute, it was held in *Bridgers* v. *First Nat. Bank of Tarboro et al.*, 67 S. E. 770 (N. C.), following previous decisions by the same court,[1] that a voting trust for fifteen years was against public policy and void, and an injunction was granted at the suit of a stockholder not a party to the agreement, restraining the trustees from voting the stock.

A few decisions and many *dicta* are undoubtedly to be found to the effect that voting trusts are illegal *per se*.[2] The reason usually given is that it is against public policy for the voting power to be separated from the beneficial interest. It is submitted, however, that this view is unsound, and imposes an unnecessary fetter on the freedom of contract. It is true that it is usually held to be impossible to give an irrevocable proxy,[3] but this is explainable by the well-known rule that an agent's power is always revocable.[4] The almost universal permission given by statute to the use of proxies, which were not allowed at common law in corporate voting,[5] is itself a sanction of the severance of the voting power from the beneficial interest. The old idea that a corporate franchise was a mark of favor and confidence from the state, imposing a duty on the shareholders to use their individual ability in the management of the corporation, is obsolete to-day, when incorporation is possible for nearly every one, and when many shareholders in large corporations are simply investors. A further objection to this so-called rule of public policy is, that ordinary trustees and pledgees of stock may vote it.[6]

Manifestly a voting trust or pooling agreement is invalid if it has an unlawful object other than the mere separation of the voting power and beneficial interest.[7] In nearly every case where such an agreement has been overthrown it was in fact tainted with some additional illegality, and the broad language used in some of the decisions is to be regretted.[8] It would seem, therefore, both on principle and on authority, that a voting trust is not illegal *per se*, and that each case should be decided on

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[1] Harvey *v.* Linville Improvement Co., 118 N. C. 693; Sheppard *v.* Power Co., 150 N. C. 776.

[2] Shepaug Voting Trust Cases, 60 Conn. 553; Clowes *v.* Miller, 60 N. J. Eq. 179; Vanderbilt *v.* Bennett, 6 Pa. Co. Ct. R. 193. See Ohio R. Co. *v.* State, 49 Oh. St. 668; Warren *v.* Pim, 66 N. J. Eq. 353, 363.

[3] Schmidt *v.* Mitchell, 101 Ky. 570; Woodruff *v.* Dubuque & S. C. R. Co., 30 Fed. 91. But see Brown *v.* San Francisco S. S. Co., 5 Blatchf. (U. S.) 525; Chapman *v.* Bates, 60 N. J. Eq. 17.

[4] Blackstone *v.* Buttermore, 53 Pa. 266.

[5] Taylor *v.* Griswold, 14 N. J. L. 222.

[6] *Re* North Shore, etc. Ferry Co., 63 Barb. (N. Y.) 556; Canadian Imp. Co. *v.* Lea, 69 Atl. 455 (N. J.).

[7] Clark *v.* Central R. R. & Banking Co., 50 Fed. 338, — suppression of competition.

[8] Cone *v.* Russell, 48 N. J. Eq. 208, — obtaining office; Shepaug Voting Trust Cases, *supra*, — secret profits for parties to the agreement; Hafer *v.* N. Y., L. E. & W. R. R. Co., 14 Wkly. L. Bul. 68, — restraint of trade; Gage *v.* Fisher, 5 N. D. 297, — obtaining office.

its particular facts.[9] If this proposition is granted, it would also seem that such an agreement should be irrevocable if made so in terms, and supported by a good consideration or coupled with an interest.[10]

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FRAUD AND INCONTESTABILITY CLAUSES IN LIFE INSURANCE POLICIES. — Most life insurance policies now contain a clause providing that in certain contingencies the policy shall be incontestable. How does this affect the underwriter's right to contest liability because of deceit in the application for the insurance? This question presents two others: does the language of the clause mean that the defense of fraud is waived; and if so, is the stipulation valid to that extent? On the first of these the authorities are agreed that the words "shall be incontestable," without more, mean a waiver of the defense of fraud.[1] Moreover, on the principle of construing the contract most strongly against the underwriter,[2] courts have usually allowed the incontestability clause to prevail,[3] even where other parts of the contract indicate that misrepresentation shall be ground for refusal of payment.

This stipulation appears in two forms, the one stating that the policy is incontestable from date, and the other providing that it shall be so after the lapse of a given time. The validity of an agreement in a contract not to set up the defense of fraud in an action on that contract has often been at issue in cases foreign to the subject of insurance; and while there is a clear conflict of authority, the better view holds most agreements of this nature void.[4] Fraud does not "vitiate consent," [5] so as to make any negotiation into which it enters a nullity, but only gives the innocent party the option of avoiding the contract.[6] While this can be waived, after the fraud is discovered,[7] it is against public policy to permit a fraudulent person to reap benefit from his deceit merely by introducing an agreement about it into the original contract.[8] But it is submitted that in life insurance contracts the attitude of the law should be different.[9] In these the mooted provision is not inserted by the party seeking to benefit by it, but by the insurance company [10]

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[9] Mobile & Ohio R. R. Co. *v.* Nicholas, 98 Ala. 92; Williams *v.* Montgomery, 148 N. Y. 519; Smith *v.* S. F. & N. P. Ry. Co., 115 Cal. 584; Greene *v.* Nash, 85 Me. 148. See Brightman *v.* Bates, 175 Mass. 105; 15 HARV. L. REV. 756.

[10] See Chapman *v.* Bates, *supra;* Smith *v.* S. F. & N. P. Ry. Co., *supra;* 10 HARV. L. REV. 428. *Contra*, Griffith *v.* Jewett, 15 Wkly. L. Bul. 419 (Oh.).

[1] Mass. Benefit Life Assn. *v.* Robinson, 104 Ga. 256; Wright *v.* Mutual Benefit Life Assn., 118 N. Y. 237. But see Reagan *v.* Union Mutual Life Ins. Co., 189 Mass. 555.

[2] See National Bank *v.* Ins. Co., 95 U. S. 673, 678.

[3] Ins. Co. *v.* Fox, 106 Tenn. 347; Vetter *v.* Mass. National Life Assn., 29 N. Y. App. Div. 72. *Contra*, Welch *v.* Union Central Life Ins. Co., 108 Iowa 224.

[4] See 18 HARV. L. REV. 466.

[5] This language, however, is common. See VANCE, INSURANCE, 532.

[6] See Nealon *v.* Henry, 131 Mass. 153; WILLISTON'S WALD'S POLLOCK CONTRACTS, 706.

[7] See Wheeler *v.* McNeil, 101 Fed. 685.

[8] Hofflin *v.* Moss, 67 Fed. 440; Bridger *v.* Goldsmith, 143 N. Y. 424.

[9] See RICHARDS, INSURANCE, §§ 379, 380.

[10] Statutes in several states forbid companies to issue a policy without a clause of incontestability. See ALA. CIV. CODE, 1907, § 4573; MASS. ACTS & RESOLVES, 1907,